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Public Prosecutor v Lim Kiang Chai

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–162–07 OF 2013(Q)
RAUS SHARIF PCA, ABDULL HAMID EMBONG, AHMAD MAAROP, ZAINUN ALI AND ABU SAMAH NORDIN FCJJ
13 JANUARY 2016

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Criminal Procedure — Appeal — Appeal against decision of Court of Appeal — Appeal by prosecution — Accused charged at High Court for murder — Prosecution relied on cautioned statement by accused — Accused alleged that cautioned statement should not be accepted — Allegation that cautioned statement made under oppressive condition — Whether cautioned statement properly administered — Whether caution carried out in proper manner — Whether cautioned statement made voluntarily — Whether cautioned statement corroborated — Whether cautioned statement needs to be corroborated — Penal Code, s 302

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The respondent was charged at the High Court for the murder of one Fabian Lim ('the deceased'), an offence under s 302 of the Penal Code. The deceased was reversing his car out of the parking lot when two persons on a motorcycle wearing full-faced crash helmets drew up and stopped behind his car. The pillion rider ('the gunman') got off the motorcycle, approached the car and fired several shots at the deceased. The deceased collapsed beside his wife, who was also injured by glass splinters. In establishing the respondent's identity, the prosecution relied primarily but not entirely, on the respondent's cautioned statement which described in detail the planning prior to the killing of the deceased, the execution of the plan on the fateful day and what transpired thereafter. However, the respondent claimed that the cautioned statement was not made voluntarily as it was given under oppressive conditions. The respondent challenged the admissibility of the cautioned statement on the grounds that it was not properly administered; the recording of the caution was not done in a proper manner; and that it was not given voluntarily. At the conclusion of a trial within a trial, the trial judge was satisfied that the respondent gave the cautioned statement voluntarily, without any inducement, threat or promise and admitted it as part of the prosecution case against the respondent. The prosecution also called one Sim Eng Huat ('PW26') who testified that he had trailed the deceased's car for several days before the deceased was shot and observed the deceased's movements on the day of the shooting. He was in the vicinity of the scene of the crime on the fateful day and saw the pillion rider shooting at the deceased's car and later fleeing from the scene on a motorcycle ridden by another person. After they left he went to have

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a look at the car. He knew the pillion rider and the driver of the motorcycle because he asked them. At the end of the trial, the trial judge found that the prosecution had proven its case beyond reasonable doubt and that the respondent failed to raise a reasonable doubt on the prosecution's case and accordingly found him guilty as per charge and sentenced him to death. The respondent appealed to the Court of Appeal against his conviction and sentence. In allowing the appeal, the Court of Appeal held that the cautioned statement was not given voluntarily as the respondent had, before giving the cautioned statement been subjected to oppressive conditions, namely, long and uninterrupted interrogation of ten and a half hours each day for five consecutive days without food, drinks and toilet breaks. The Court of Appeal came to the said conclusion based on the records of the detention register and the lock-up entries. The Court of Appeal set aside the conviction of the respondent by the High Court. Hence, the present appeal by the prosecution. The prosecution contended that the Court of Appeal erred in holding that the cautioned statement was not made voluntarily; and there was no independent corroborative evidence whatsoever of that part of the cautioned statement directly pertaining to the identity of the rider of the motorcycle.

Held, allowing the appeal:

(1) Although the entries in the diaries show the length of time the respondent was taken out of the cell for interrogation, the actual interrogation was only for five to six hours per day. There were breaks for lunch in between the interrogation. The respondent was not tortured. He was not denied food or drinks or toilet breaks. There was no oppression. The length of time or the number of hours the respondent was taken out of the cell as shown in the station diaries was not a true reflection of the number of hours the respondent was actually interrogated. The persons who made the entries were not present during the interrogation and would not know how long the interrogation took place. Only the interrogators or persons involved with the interrogations would know (see paras 38 & 42).

(2) The trial judge heard and saw the said witness, including the other prosecution witnesses and the respondent and his witness testified before him. He had the first hand advantage of hearing and observing the witnesses giving evidence before him and to observe their demeanour, which an appellate court is at a disadvantage. The credibility of a witness is primarily a matter for the trial judge (see para 42).

(3) It is a question of fact whether the respondent was induced, threatened or promised or subjected to oppressive conditions, into making the cautioned statement. Section 113 of the Criminal Procedure Code uses the word 'appears'. Thus, if it appears to the court that the cautioned statement was made involuntarily, it should be excluded. The word

'appears' indicate a lesser degree of probability than 'proved'. A mere possibility that the confession was not voluntary is insufficient to warrant its rejection but a probability would suffice to dictate its rejection in evidence (see paras 39 & 41).

(4) Corroboration need not be direct evidence that the accused committed the crime. It was sufficient if it was merely circumstantial evidence of his connection with the crime. Corroboration must be in material particulars and it was not necessary that the whole prosecution story or all material particulars should be corroborated. The shooting incident should not be considered in isolation from with the events that preceded the murder. It must be considered in the light of the surrounding circumstances leading to the murder (see paras 53 & 55).

(5) There were ample independent evidence to corroborate PW26's evidence in material particulars. PW16's evidence that the deceased's car had been trailed by a golden coloured Proton Wira corroborated PW26's evidence that he had been trailing the deceased's car before the deceased was shot. PW20 could even see the Proton Wira car from his office and took down the car's registration number before passing the information to the police who arrested PW26. PW18 who identified PW26 as the person who walked up the staircase leading to the deceased's office supported PW26's evidence that he had been observing the deceased going into and leaving his office. PW21 gave evidence that PW26 brought him to the place where the badly burnt motorcycle which was allegedly ridden by the respondent on the day of the shooting was found. There was no ground for the court to interfere with the assessment of PW26's evidence by the trial judge (see para 76).

[Bahasa Malaysia summary

Responden telah didakwa di Mahkamah Tinggi kerana membunuh Fabian Lim ('si mati'), satu kesalahan di bawah s 302 Kanun Keseksaan. Si mati telah mengundur keretanya di lot parker apabila dua orang atas motorsikal yang memakai topi keledar bermuka penuh datang dan berhenti di belakang keretanya. Pembonceng ('lelaki bersenjata') telah turun dari motorsikal, menuju kereta itu dan melepaskan beberapa tembakan ke arah si mati. Si mati rebah di sebelah isterinya, yang juga cedera akibat serpihan kaca. Dalam membuktikan identiti responden, pendakwaan bergantung terutamanya tetapi tidak secara keseluruhan, pada kenyataan beramaran responden yang menggambarkan secara terperinci perancangan sebelum pembunuhan si mati, pelaksanaan pelan itu pada hari malang itu dan apa yang berlaku selepas itu. Walau bagaimanapun, responden mendakwa kenyataan beramaran tidak dibuat secara sukarela kerana ia telah diberikan dalam keadaan yang tertindas. Responden mencabar kebolehterimaan kenyataan beramaran atas alasan bahawa ia tidak diberikan sewajarnya; rakaman tentang amaran itu tidak dilakukan dengan cara yang betul; dan bahawa ia tidak diberikan secara

sukarela. Pada kesimpulan perbicaraan dalam perbicaraan, hakim perbicaraan berpuas hati bahawa responden telah memberikan kenyataan beramaran secara sukarela, tanpa apa-apa dorongan, ugutan atau janji dan menerima ia sebagai sebahagian daripada kes pendakwaan terhadap responden. Pendakwaa juga memanggil Sim Eng Huat ('PW26') yang memberi keterangan bahawa dia telah mengekori kereta si mati selama beberapa hari sebelum si mati ditembak dan telah memerhati pergerakan si mati pada hari tembakan itu. Dia berada dalam kawasan kejadian jenayah itu pada hari yang malang tersebut dan melihat pembonceng motorsikal menembak kereta si mati dan kemudian melarikan diri dari tempat kehadian atas motorsikal yang dipandu oleh orang lain. Selepas mereka pergi dia melihat kereta itu. Dia mengetahui pembonceng dan penunggang motorsikal itu kerana dia bertanya kepada mereka. Di akhir perbicaraan, hakim perbicaraan mendapati bahawa pendakwaan telah membuktikan kesnya melampaui keraguan munasabah dan bahawa responden telah gagal menimbulkan keraguan munasabah ke atas kes pendakwaan dan sewajarnya mendapatinya bersalah sepertimana pertuduhan dan menjatuhkan hukuman mati ke atasnya. Responden merayu kepada Mahkamah Rayuan terhadap sabitan dan hukumannya. Dalam membenarkan rayuan itu, Mahkamah Rayuan memutuskan bahawa kenyataan beramaran itu tidak diberikan secara sukarela kerana responden telah, sebelum memberikan kenyataan beramaran itu telah berada dalam keadaan yang tertindas, iaitu, soal siasat yang lama dan tidak diganggu selama sepuluh jam setengah setiap hari selama lima hari berturut-turut tanpa makanan, minuman dan berhenti rehat untuk ke tandas. Mahkamah Rayuan tiba kepada kesimpulan tersebut berdasarkan rekod-rekod daftar tahanan dan entri-entri penjara. Mahkamah Rayuan telah mengetepikan sabitan ke atas responden oleh Mahkamah Tinggi. Justeru, rayuan ini oleh pendakwaan. Pendakwaan berhujah bahawa Mahamah Rayuan terkhilaf dalam memutuskan bahawa kenyataan beramaran itu tidak dibuat secara sukarela; dan tiada keterangan sokongan yang bebas tentang bahagian kenyataan beramaran yang secara langsung berkaitan untuk mengenal pasti penunggang motorsikal itu.

Diputuskan, membenarkan rayuan:

(1) Walaupun entri-entri dalam diari-diari menunjukkan tempoh masa responden dibawa keluar dari sel untuk disoal siasat, soal siasat sebenar hanya selama lima hingga enam jam sehari. Terdapat waktu rehat untuk makan tengahari antara soal siasat itu. Responden tidak diseksa. Dia tidak dinafikan makanan atau minuman atau ke tandas. Tidak ada penindasan. Tempoh masa atau bilangan jam yang responden dibawa keluar dari sel sepertimana ditunjukkan dalam diari-diari stesen bukan gambaran sebenar bilangan jam sebenar responden disoal siasat. Orang-orang yang membuat entri-entri itu tudak hadir semasa soal siasat dan tidak mungkin mengetahui berapa lama soal siasat itu diadakan. Hanya penyoal siasat atau orang yang terliat dengan soal siasat itu akan

A mengetahui (lihat perenggan 38 & 42).

(2) Hakim perbicaraan telah mendengar dan melihat saksi tersebut, termasuk saksi-saksi pendakwaan lain dan responden dan saksinya yang memberi keterangan di hadapannya. Beliau telah mendapat kelebihan
B mendengar dahulu untuk mendengar dan meneliti saksi-saksi memberi keterangan di hadapan beliau dan untuk meneliti sikap mereka, yang mana mahkamah rayuan tiada kelebihan itu. Kebolehpercayaan saksi adalah perkara penting untuk hakim perbicaraan (lihat perenggan 42).

(3) Ia adalah persoalan fakta sama ada responden telah didorong, diugut atau
C dijanjikan atau tertakluk kepada keadaan yang menindas, dalam membuat kenyataan beramaran itu. Seksyen 113 Kanun Tatacara Jenayah menggunakan perkataan 'appears'. Oleh itu, jika ia kelihatan kepada mahkamah bahawa kenyataan beramaran telah dibuat secara sukarela, ia hendaklah dikecualikan. Perkataan 'appears' menunjukkan
D tahap kebarangkalian yang lebih rendah dariapda 'proved'. Kemungkinan semata-mata bahawa pengakuan itu tidak secara sukarela tidak mencukupi untuk mewajarkan penolakannya tetapi kebarangkalian mencukupi untuk penilakannya dalam keterangan (lihat perenggan 39 & 41).

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(4) Sokongan tidak perlu keterangan secara langsung bahawa tertuduh telah melakukan jenayah. Ia mencukupi jika ia keterangan mengikut keadaan semata-mata tentang kaitnnya dengan jenayah. Sokongan mestilah dalam butiran-butiran penting dan ia tidak perlu di mana keseluruhan
F cerita pendakwaan atau semua butiran-butiran penting patut disokong. Kejadian tembakan itu tidak patut diambil kira secara berasingan daripada kejadian-kejadian sebelum pembunuhan itu. Ia perlu diambil kira berdasarkan keadaan sekeliling yang membawa kepada pembunuhan itu (lihat perenggan 53 & 55).

G (5) Terdapat keterangan berasingan yang mencukupi untuk menyokong keterangan PW26 dalam butiran-butiran penting. Keterangan PW16 bahawa kereta si mati telah diekori oleh Proton Wira berwarna emas menyokong keterangan PW26 bahawa dia telah mengekori kereta si mati sebelum si mati ditembak. PW20 juga boleh melihat kereta Proton Wira
H itu dari pejabatnya dan menulis nombor pendaftaran kereta itu sebelum memberitahu maklumat itu kepada polis yang menangkap PW26. PW18 yang telah mengecam PW26 sebagai orang yang naik tangga ke pejabat si mati menyokong keterangan PW26 bahawa dia telah memerhati si mati masuk dan meninggalkan pejabatnya. PW21
I memberi keterangan bahawa PW26 telah membawanya ke tempat di mana motorsikal yang teruk dibakar yang didakwa telah ditunggang oleh responden pada hari tembakan itu dijumpai. Tiada alasan untuk mahkamah menggangu penilaian keterangan PW26 oleh hakim perbicaraan (lihat perenggan 76).]

Notes

For a case on appeal against decision of Court of Appeal, see 5(1) *Mallal's Digest* (5th Ed, 2015) para 420.

Cases referred to

Abdul Mahmud v PP [1980] 2 MLJ 50 (refd)
Amathevelli a/p P Ramasamy v PP [2009] 2 MLJ 367; [2009] 3 CLJ 109, FC (refd)
Attan bin Abdul Ghani v PP [1970] 2 MLJ 143 (refd)
Chan Ming Cheng v PP [2002] 3 MLJ 733, CA (refd)
DPP v Hester [1972] 3 All ER 1056; [1973] AC 296, HL (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
DPP v Kilbourne [1973] AC 729, HL (refd)
Hasibullah bin Mohd Ghazali v PP [1993] 3 MLJ 321, SC (refd)
Juraimi bin Husin v PP; Mohd Affandi bin Abdul Rahman & Anor v PP [1998] 1 MLJ 537, CA (refd)
Khoon Chye Hin v PP [1961] MLJ 105b, CA (refd)
King, The v Baskerville [1916] 2 KB 658, CA (refd)
Lee Choh Pet & Ors v PP (No 2) [1972] 1 MLJ 187, CA (refd)
Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor [1995] 2 MLJ 276, HC (refd)
Mohamed Ali v PP [1962] 1 MLJ 230 (refd)
Mohamed Yusof bin Haji Ahmad v PP [1983] 2 MLJ 167 (refd)
Muniandy & Ors v PP [1966] 1 MLJ 257, FC (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
PP v Chant Choon Keong & Ors [1989] 2 MLJ 427, HC (refd)
PP v Chong Boo See [1988] 3 MLJ 292; [1988] 1 CLJ 679, HC (refd)
PP v Dato Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
PP v Kamde bin Raspani [1988] 3 MLJ 289, HC (refd)
PP v Law Say Seck & Ors [1971] 1 MLJ 199 (refd)
PP v Lai Pong Yuen & Ors [1968] 1 MLJ 12 (refd)
R v Wilson [1981] 1 NZLR 316, CA (refd)
Sinaraju v PP [1961] 1 MLJ 33, CA (refd)
Tan Teow Swee v Regina [1955] 1 MLJ 76 (refd)
Tan Too Kia v PP [1980] 2 MLJ 187, FC (refd)
Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401, SC (refd)

A *Wong Kam-Ming v The Queen* [1980] AC 247, PC (refd)
Yaacob v PP [1966] 1 MLJ 67, FC (refd)
Yuill v Yuill [1945] P 15, CA (refd)

Legislation referred to

B Criminal Procedure Code ss 113, 402A
Evidence Act 1950 ss 114, 114(a), 133
Penal Code ss 34, 118, 302

Appeal from: Criminal Appeal No Q-05–21 of 2009 (Court of Appeal, C Putrajaya)

Noriana bt Bahadun (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Kitson Foong (Kit & Assoc) for the respondent.

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Abu Samah Nordin FCJ (delivering judgment of the court):

[1] This is an appeal by the public prosecutor against the decision of the Court of Appeal which had set aside the conviction of the respondent by the E Kuching High Court on a charge of murder under s 302 read with s 34 of the Penal Code. At the Kuching High Court the respondent was charged, together with another person still at large, with having committed the murder of Mr Fabian Lim Ann Hoaw ('the deceased') on 18 February 2005 at about 6.15pm in front of Fu Xiang Food Centre at Rubber Road, Satok, Kuching, Sarawak.

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[2] At the end of the trial the learned trial judge found that, upon maximum evaluation, the prosecution had proven its case beyond reasonable doubt and that the respondent had failed to raise a reasonable doubt on the prosecution's case and accordingly found him guilty of murder under s 302 of the Penal Code G and sentenced him to death.

[3] The respondent appealed to the Court of Appeal against his convicton and sentence. The Court of Appeal allowed the appeal and set aside the conviction and sentence on the ground that the cautioned statement of the H respondent which was the primary basis (if not the sole basis) of his conviction was not made voluntarily. The Court of Appeal held that it was unsafe to convict the respondent solely on the cautioned statement without independent corroboration. An accused person may be convicted solely on the strength of a

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confession but as a matter of prudence the court looks for corroboration: *Sinaraju v Public Prosecutor* [1961] 1 MLJ 33 (CA), *Public Prosecutor v Lai Pong Yuen & Ors* [1968] 1 MLJ 12, *Juraimi bin Husin v Public Prosecutor; Mohd Affandi bin Abdul Rahman & Anor v Public Prosecutor* [1998] 1 MLJ 537. The Court of Appeal disagreed with the findings of the trial court that there was independent corroborative evidence to show that the respondent was involved in the murder of the deceased. The trial court had found that the corroborative evidence came from PW26 (Sim Eng Huat) who was in the gold coloured Proton Wira car No BFJ 9275 when the respondent was arrested by the police on 1 February 2005; and the black bag ('exh P110') seized from the house rented by the respondent on 2 March 2005. The Court of Appeal held that there was no evidence from PW26 to corroborate the respondent's cautioned statement that the respondent was involved in the murder of the deceased. The black brief case ('exh P110') was not corroborative evidence to connect the respondent with the murder of the deceased.

[4] We heard the appeal on 8 September 2015 and reserved our decision. Now, this is our decision.

BACKGROUND FACTS

[5] Briefly, the case for the prosecution is that on 18 February 2005 the deceased, who was a lawyer and partner of the law firm of Messrs Lim & Lim, after finishing work, went with his wife, Chin Siew Chin ('PW16') to Fu Xiang Food Centre at Rubber Road, Satok, Kuching for their dinner. After the dinner the deceased and his wife made their way to their car, a Mercedez Benz, which was parked nearby. As the deceased was reversing his car out of the parking lot, two persons on a motorcycle wearing full faced crash helmets drew up and stopped behind his car. The pillion rider ('the gunman') got off the motorcycle, approached the car and fired several shots at the deceased. The deceased collapsed beside his wife, who was also injured by glass splinters. The gunman then escaped on the motorcycle ridden by his companion who drove the motorcycle against the flow of traffic. The deceased passed away upon arrival at the Kuching General Hospital.

[6] The prosecution also produced evidence that prior to the shooting incident the deceased's car had been trailed by two persons in a gold coloured Proton Wira car. They were arrested by the police on the same day, that is, on 1 February 2005 acting on information provided by PW20, who was the deceased's partner in Messrs Lim & Lim. A few days before that, ie on 20 January 2005 a male Chinese came to the office of Messrs Lim & Lim to look for Fabian Lim ('the deceased') but was told by PW19 that he was busy. On 22 January 2005 there was a break in at the deceased's office. Several items,

A including photographs, some bags and a RM1m cheque were stolen. The deceased lodged a police report on the same day.

[7] On 2 March 2005 the rider of the motorcycle was arrested at his sister's house in Sibu. He was subsequently charged with the murder of the deceased together with another person (still at large) in furtherance of a common intention under s 302 of the Penal Code read with s 34 of the said code. The rider of the motorcycle is the respondent in this appeal.

[8] At the trial before the High Court, to prove its case, the prosecution relied, among others, on the cautioned statement of the respondent and on the evidence of three witnesses who were at or near the scene of the incident and who either heard or saw the shooting. The three witnesses were Capt Mohd Faizal bin Zakaria ('PW10'), Poo Siang Hin ('PW13') and Chin Siew Chin ('PW16'), the deceased's wife.

[9] A bystander, Capt Mohd Faizal bin Zakaria ('PW10') was in his friend's car which was parked facing the Fu Xiang Food Centre when he heard the explosions three or four times which later turned out to be the sounds of gunshots. He came out of the car, crossed the road and approached the Mercedez Benz's car which was seen reversing at the time of the shooting. He also saw a person riding a motorcycle alone and after the shooting sped off on the motorcycle with the gunman as a pillion rider. He saw that the deceased was injured and the wife was shouting for assistance. He placed the deceased at the backseat and droved the deceased's car to the hospital with his wife beside him. The deceased was pronounced dead upon arrival. Dr Jamil Dolkadir ('PW14'), who performed the post-mortem on the deceased testified that the cause of the deceased's death was due to gunshot wounds to the chest and neck.

[10] Another witness, Poo Siang Hui ('PW13'), a hawker stall owner at the Rubber Road also heard the sounds of gunshots which he originally thought were the sounds of firecrackers. He looked at the direction from where he heard the sounds and saw a man holding a gun near the driver of the Mercedez Benz car. He then saw the man fired two more shots at the driver of the car and stood there for a while looking at the driver before running away towards a waiting motorcycle ridden by another person. They fled the scene immediately after the shooting. PW13, however could not see the gunman's face as he was wearing a crash helmet with a visor covering his face. He also did not know the model of the motorcycle.

[11] Madam Chin Siew Chin, the deceased's wife, ('PW16'), who was seated in the car beside the deceased, testified that she heard a very loud noise like the sound of a firecracker while her husband was reversing the car out of the parking lot. She saw a dark figure outside the driver's side of the car. The window glass beside the driver was broken. Blood was flowing from the deceased's head. Her husband fell towards her. She held him in her arms. Then she heard more sounds. After the third sound her husband collapsed to her left side. Then she heard another sound. She saw his face was covered with blood and shouted for assistance. She could not however recognise the man standing outside the car beside the driver's seat.

[12] None of these three witnesses who either heard the sounds of the shooting or saw the gunman in the acts of the shooting could identify the gunman nor the rider of the motorcycle. Both the gunman and the rider of the motorcycle were wearing crash helmets with visors. None of them were able to tell the registration number of the motorcycle.

[13] Besides these three witnesses, the prosecution also called Sim Eng Huat ('PW26'). He testified that he had trailed the deceased's car for several days before the deceased was shot and observed the deceased's movements on the day of the shooting. He was in the vicinity of the scene of the crime on the fateful day and saw the pillion rider shooting at the Merzedes Benz car and later fleeing from the scene on a motorcycle ridden by another person. After they left he went to have a look at the car. He told the court, in response to a question by learned defence counsel during cross-examination, that he knew the pillion rider and the driver of the motorcycle because he asked them. We will deal with the credibility of PW26 in the later part of our judgment.

[14] The prosecution relied primarily but not entirely, on the cautioned statement of the respondent to establish his identity. The trial judge admitted the cautioned statement ('exh P114') after a lengthy trial-within a trial after ruling that it was made voluntarily. In his cautioned statement, the respondent admitted that he was the rider of the said motorcycle. At the end of the prosecution case the trial court found that the prosecution had established a prime facie case and called upon the respondent to enter his defence.

[15] The respondent gave evidence on oath. No other witnesses were called by the defence. In his defence he denied that he was involved in the planning, preparation and murder of the deceased. He said that on the date the deceased was killed, that is on 18 February 2005 he was not in Kuching as he had left for Sibu on 16 February 2005 together with his girlfriend, named Yosi Yolanda to visit the Ba Wan Gong Temple with one 'Ah Tee' to pray. On 17 February 2005, he went to the temple with Ah Tee. On 18 February 2005 he went with Ah Tee to a timber camp along the Sibu/Bintulu road. The respondent claimed that he

was a businessman engaged in timber business as a freelance broker. He only returned to Kuching on 19 February 2005. He returned to Sibu on 26 February 2005 where he was later arrested at his sister's house and brought back to Kuching by the police on the same day to be investigated and remanded at the Sungai Maong Police Station. In short, he raised a defence of alibi but the trial court excluded the evidence as he failed to give a notice under s 402A of the Criminal Procedure Code.

[16] The respondent claimed that he did not give the cautioned statement voluntarily. It was given under oppressive conditions due to prolonged uninterrupted interrogation and torture and that he was deprived of food and drinks. Everything that was stated in the cautioned statement was not true as it was either made up by him from the information related to him by the policemen while under interrogation or it was written without his knowledge or approval as it was not properly translated to him by the recording officer. The cautioned statement was in Malay language while the communication between him and the recording officer ('PW22') was in Hokkien.

[17] What did the respondent say in his cautioned statement? In his cautioned statement the respondent described in detail the planning prior to the killing of the deceased, the execution of the plan on the fateful day and what transpired thereafter. The respondent said that in late December 2004, he was approached by his childhood friend one Roger Wong asking whether he was willing to 'finish off' a person, ie 'menghapuskan satu orang', who had hurt the feelings of someone, for a certain sum of money. The respondent said that he was not willing to do so. His childhood friend then asked him if he could to find him a pistol, which he also declined. The respondent told Roger Wong that he knew one Wong Poh Too ('Ah Hoo') whose friends would be willing to carry out the killing for a sum of money. The respondent called Ah Hoo, who in turn told the respondent that his friends from Bintulu had agreed to carry out the killing provided that the sum of money would be increased. The respondent conveyed the information to Roger Wong.

[18] In January 2005 the respondent said that he received a telephone call from Roger Wong, who was already in Kuching. On that day, Roger Wong, Ah Hoo and the two friends of Ah Hoo, who were Ah Bee and Ah Huat held a discussion on the proposed plan at the respondent's house. It was at this meeting that Roger Wong informed the others that the target in question was Fabian Lim ('the deceased') of Messrs Lim & Lim whose office was in Satok. But they did not have his photograph. The next day the respondent and Ah Hoo showed Ah Bee and Ah Huat the deceased's office.

[19] Two or three days later, Ah Bee handed over to the respondent, among others a cheque of RM1m, seven or eight photographs, two of which include the deceased's picture. Ah Bee told the respondent that those items were stolen from the deceased's office during a break in.

[20] From that day onwards the respondent said that he was told that Ah Bee, Ah Huat and one Liaw Fei started trailing the deceased by car. On 1 February 2005 the police stopped a Proton Wira car where Ah Huat and Liaw Fei were in, based on information from the deceased's partner, PW20. The deceased had earlier telephoned PW20 that he was being trailed by a Proton Wira car. Thereafter the plan was shelved. But on 14 February 2005, on the 6th day of the Chinese New Year the plan was revived. The deceased was kept under surveillance.

[21] On 18 February 2005, the respondent said that he, together with Ah Bee riding as pillion, trailed the deceased's car which was heading towards the restaurant and kept surveillance on the deceased whilst he was in the restaurant. When the deceased returned to his car with his wife, the respondent followed the deceased's car with Ah Bee, riding as pillion and stopped behind the deceased's car. The car was at the time reversing out of the parking lot. The pillion rider then jumped out of the motorcycle and started shooting at the deceased. The respondent saw the deceased fell towards his wife. The pillion rider then escaped on the motorcycle ridden by the respondent. The motorcycle was later abandoned at Matang. On 1 March 2005 the police found a badly burnt motorcycle at Matang.

[22] The original text of the cautioned statement which was recorded in Malay language described what happened on 18 February 2005, as follows:

> Lebih kurang 5 pm, Ah Bee berhubung dengan Ah Huat dan bertanyakan keadaan. Ah Huat berkata belum habis waktu pejabat. Ah Bee menyuruh Ah Huat bertukar tempat dan jangan asyik berada di hadapan pejabat Lim & Lim.
>
> Selepas itu Ah Bee memberi kunci motosikal dan menyuruh saya membawa motosikal dan dia jadi pembonceng. Kami berpusing-pusing di keliling pejabat Lim & Lim.
>
> Lebih kurang 6 pm, Ah Huat menelefon Ah Bee dia berkata Fabian Lim telah masuk ke kereta dan menyuruh Ah Bee datang cepat. Ah Bee menyuruhnya jangan menutup telefon dan terus menghubungnya.
>
> Pada masa kami sampai kereta Mercedes Fabian Lim pun keluar. Kami nampak Fabian bersama isteri turun dari kereta selepas meletakkan kereta di hadapan kedai restaurant. Fabian Lim dan isteripun makan di kedai. Saya pun menunggang di keliling kedai makan.
>
> Selepas itu kami pun berhenti di tepi bangunan dan masih nampak Fabian Lim dan isteri. Ah Bee pun menyuruh Ah Huat meletakkan kereta di hadapan kedai agar nampak mereka.

Pada masa itu saya masih bertanya kepada Ah Bee adakah betul-betul kita hendak melakukan perkara ini. Ah Bee berkata mesti dilakukan juga tiada pilihan lain kerana amat memerlukan wang.

Pada masa itu, Ah Huat pun berkata di dalam telefon mengatakan peguam Fabian Lim telah keluar. Ah Bee mengarahkan saya cepat memandu ke belakang keretanya dan berhenti. Suami isteri telah masuk ke dalam kereta Mercedes, Ah Bee pun melompat turun dari motosikal dan bergegas ke arah pemandu dan melepaskan satu das tembakan. Cermin kereta pecah dan saya nampak Fabian Lim telah tumbang ke arah isterinya.

Saya nampak Ah Bee cuba melepaskan tembakan kedua tetapi pistolnya telah tersangkut. Saya nampak Ah Bee mencekak pistolnya dan saya nampak satu peluru terkeluar. Ah Bee pun terus melepaskan dua das tembakan lagi. Ah Bee terus menaiki motosikal saya dan menyuruh saya terus lari.

Kami menunggang motosikal ke jambatan Matang dan meletakkan motosikal di situ. Saya dan Ah Bee pun menaiki kenari saya dan terus ke Jalan Matang ke Batu Kawa.

[23] The cautioned statement, if admitted, would expose the identity of the respondent as the rider of the motorcycle. The learned trial judge stated in his judgment that he was acutely aware that there was no eyewitness account of the identity of the gunman and the rider of the motorcycle. The only evidence of their identity came from the respondent's cautioned statement.

TRIAL WITHIN A TRIAL

[24] In the trial within a trial to determine the admissibility of the respondent's cautioned statement made under s 113 of the Criminal Procedure Code ('the CPC'), the prosecution called 16 witnesses while the defence called the respondent himself and another witness. The prosecution also called 15 rebuttal witnesses.

[25] The defence challenged the admissibility of the cautioned statement on the grounds that it was not properly administered, the recording of the caution was not done in a proper manner and that it was not given voluntarily.

[26] At the conclusion of the trial within a trial, the learned trial judge was satisfied that the respondent gave the cautioned statement voluntarily, without any inducement, threat or promise and admitted it as part of the prosecution case against the respondent.

[27] The Court of Appeal however had a different opinion. It held that the cautioned statement was not given voluntarily as the respondent had, before giving the cautioned statement been subjected to oppressive conditions, that is, long and uninterrupted hours of interrogation, some ten and a half hours each

day, for five days without food and drinks and toilet breaks. The Court of Appeal came to the said conclusion based on the records of the detention register and the lock up entries. This is what the Court of Appeal said:

> In our judgment, based on the evidence adduced during the trial within a trial, the prosecution had failed to prove beyond reasonable doubt that the cautioned statement was made by the appellant voluntarily. We note from the evidence that the appellant was subjected to long hours of interrogation for five consecutive days from 3 March 2005 until 7 March 2005. The length of interrogation was about 10 and a half hours each day (of course, we make allowance for lunch breaks and toilet breaks in between). The lock-up Diary shows that every day (during the said five consecutive days) the appellant would be taken out from his cell to the interrogation room for interrogation early in the morning at around 7am; and he would be brought back to his cell late in the evening around 5:30pm.
>
> After the intensive long hours of interrogation for a period of five consecutive days, the cautioned statement was recorded on 8 March 2005 from 10:05 am until 1:30 pm. It was recorded by one Chief Inspector Ang Seow Aun (TWT-PW1).
>
> Before the learned trial Judge, it was contended by the appellant that the interrogation of the appellant while he was in custody for long hours and for five consecutive days was an act of oppression on the part of the police, thus rendering the cautioned statement not voluntarily made and inadmissible. But this argument was rejected by the learned trial Judge. He held:
>
> > With regard to the accused's allegation that he was interrogated for long periods of at least 11 hours a day, I find this difficult to believe because the evidence shows, especially from the lock-up sentry assigned to escort him during that period, TWT PW(13), that the accused was served and had a lunch break daily and was also allowed to go to the toilet on request. In view of this I am more inclined to believe TWT PW12 Sgt Maj Khor that the accused's interrogation lasted for 5 to 6 hours per day.
>
> With respect, we disagree with the finding of the learned trial Judge. On the evidence, Sgt Maj Khor (TWT PW12) could not have been telling the truth. It is to be recalled that according to the Lock-Up Diary the interrogation began around 7 am and ended at around 5:30 pm. The police sentry, TWT PW13, did not elaborate to explain that for each day, how long was the lunch break; and how long were the toilet breaks? Therefore, what is the basis for Sgt Maj Khor to say that the interrogation only lasted for 5 to 6 hours per day. In our judgment, the continuous long hours of interrogation of the appellant by the police officers in question for a period of five consecutive days, constitute oppressive conduct on the part of the police officers involved in the interrogation. Thus, the cautioned statement cannot be said to have been voluntarily made by the appellant. The cautioned statement, therefore, should not have been admitted by the learned trial Judge. As the prosecution relies primarily (if not entirely) on the cautioned statement, it follows that once the cautioned statement is ruled inadmissible, then the conviction is no longer sustainable.

[28] In view of the contrasting positions taken by the courts below it is absolutely necessary to scrutinise the notes of proceeding in the trial within a trial to see whether the learned trial judge had erred in his judgment in ruling that the cautioned statement was made voluntarily.

GROUNDS OF APPEAL

[29] The appellant's appeal is based on two grounds, namely the Court of Appeal erred in holding that:

(a) the cautioned statement was not made voluntarily as it was given under oppressive conditions, namely long and uninterrupted interrogation of ten and a half hours each day for five consecutive days without food, drinks and toilet breaks; and

(b) there was no independent corroborative evidence whatsoever of that part of the cautioned statement directly pertaining to the identity of the rider of the motorcycle.

FIRST GROUND

[30] Learned deputy public prosecutor submitted that the prosecution called 16 witnesses and 15 rebuttal witnesses to prove that the cautioned statement was made voluntarily and to rebut the allegations by the respondent that he made the cautioned statement under oppressive conditions namely long and uninterrupted interrogation of ten and a half hours each day for five continuous days without food, drinks and toilet breaks and that he was subjected to torture.

[31] The respondent also called another witness, Sim Eng Huat ('TWT DW2'). This witness, however, was not present during the interrogation of the respondent or the recording of the respondent's cautioned statement and would not be able to testify as to what transpired during the interrogation.

[32] The recording officer, Chief Insp Ang Seow Aun ('TWT PW1') testified that he administered and explained the necessary caution before recording the cautioned statement. The respondent understood it and agreed to give his statement voluntarily. TWT PW1 said that it was given without any inducement, threat or promise. At the end of the recording and after a minor amendment, the respondent said that he did not want to make any other addition or alteration.

[33] The respondent alleged that he was blindfolded throughout the five days and nights of continuous interrogation. His request for food and drinks or toilet breaks were refused. The prosecution called Lans Kpl Fauzi bin Mohd

Abdul ('TWT PW13') who testified that the respondent was not handcuffed. He also said that he watched the respondent while having his lunch. The interrogation officer ('TWT PW12') testified that the respondent was not handcuffed throughout the interrogation. There were breaks for the respondent to have his lunch and to go to toilet. He denied that there was any oppression in the interrogation.

[34] The respondent alleged that the entries in the detention register and the station lock-up diaries were fictitious or concocted. Chief Insp Stanley ('TWT PW8') and TWT PW3 who made the entries in the detention register and station diaries denied the allegations. They said they were not fictitious or concocted.

[35] The respondent claimed that he was denied medical treatment. Ismail Redzuan ('TWT PW9'), a junior hospital assistant, testified that he examined the respondent on being admitted to prison and found him healthy except for a laceration on his right upper arm. A medical report of his examination of the respondent dated 16 March 2005 was tendered as exh 'TWT P124' without objection. Dr Goh Siew Li ('TWT PW10') said that he examined the respondent on 2 March 2005 and prescribed him with Panadol, antibiotics and cough syrup.

[36] Learned counsel for the respondent submitted that the cautioned statement was not given voluntarily. The respondent was forced to make the cautioned statement after being subjected to long and continuous interrogation for five days and nights, ten and a half hours each day. He listed out in his written submission the dates and times when the respondent was taken out and returned to the lock-up as evidence of long and continuous interrogation. He also reproduced, in his written submission, the relevant parts of the respondent's evidence where the respondent said that he was refused food and drink, that he would be tortured if he did not admit to the offence and that if he admitted it, he would be released on bail and 'might face a lesser charge'. His sister and girlfriend would also be released.

[37] Learned counsel relied on several cases in support of his submission to show under what circumstances the cautioned statement would be held inadmissible as being made involuntarily and under what circumstances the interrogation would be considered as oppressive: see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, *Wong Kam-Ming v The Queen* [1980] AC 247, *R v Wilson* [1981] 1 NZLR 316, *Hasibullah bin Mohd Ghazali v Public Prosecutor* [1993] 3 MLJ 321, *Chan Ming Cheng v Public Prosecutor* [2002] 3 MLJ 733, *Public Prosecutor v Chant Choon Keong & Ors* [1989] 2 MLJ 427, *Public Prosecutor v Kamde bin Raspani* [1988] 3 MLJ 289.

[38] We have read the notes of proceeding in the trial within a trial and scrutinised the detention register and the entries in the station lock-up diaries. We found that the findings of the learned trial judge was supported by the evidence before him. His Lordship gave his reasons for every finding that he made. Whatever allegations made by the respondent were rebutted by the prosecution witnesses. His Lordship found that the respondent was not handcuffed during the interrogation. The entries in the lock-up diaries were not fictitious. Although the entries in the diaries show the length of time the respondent was taken out of the cell for interrogation, His Lordship found as a fact, based on the evidence of TWT PW12, that the actual interrogation was only for five to six hours per day. There were breaks for lunch in between the interrogation. The respondent was not tortured. He was not denied food or drinks or toilet breaks. There was no oppression. The learned trial judge accepted the evidence of the witnesses for the prosecution in the trial within a trial. As to the allegation of long and continuous interrogation for five days and nights while being blindfolded throughout, the learned trial judge found that it was not true. He accepted the evidence of Sgt Maj Khor ('TWT PW12') that the respondent's interrogation lasted only five to six hours per day.

[39] It is a question of fact whether the respondent was induced, threatened or promised or subjected to oppressive conditions, into making the cautioned statement. In *Juraimi bin Husin v Public Prosecutor; Mohd Affandi bin Abdul Rahman & Anor v Public Prosecutor* [1998] 1 MLJ 537, the Court of Appeal restated what Thompson LP in delivering the judgment of the Federal Court in *Yaacob v Public Prosecutor* [1966] 1 MLJ 67, said:

> The question of admissibility of evidence is for the judge and not the jury to decide (Criminal Procedure Code, s 224(i)(a). Where this calls for a decision as to whether the statement is free and voluntary, a question of fact is involved and that question must be decided, like any other question of fact, on evidence.

[40] The appellate court is entitled to interfere with a finding of fact relating to the voluntariness of a confession if that finding was arrived at without applying the relevant legal tests and consideration (*Hasibullah v Mohd Ghazali*). The burden is on the prosecution to prove beyond reasonable doubt that the cautioned statement was made voluntarily without any inducement, threat or promise (*Tan Too Kia v Public Prosecutor* [1980] 2 MLJ 187, *Public Prosecutor v Chong Boo See* [1988] 3 MLJ 292; [1988] 1 CLJ 679). There is no duty on the accused to show involuntariness (*Abdul Mahmud v Public Prosecutor* [1980] 2 MLJ 50.

[41] Section 113 of the Criminal Procedure Code uses the word 'appears'. Thus, if it appears to the court that the cautioned statement was made involuntarily, it should be excluded. The word 'appears' indicate a lesser degree of probability than proved: see *Mohamed Yusof Bin Haji Ahmad v Public*

Prosecutor [1983] 2 MLJ 167 at p 169, *Public Prosecutor v Law Say Seck & Ors* [1971] 1 MLJ 199 at p 201. A mere possibility that the confession was not voluntary is insufficient to warrant its rejection but a probability would suffice to dictate its rejection in evidence: *Public Prosecutor v Law Say Seck & Ors*.

[42] The length of time or the number of hours the respondent was taken out of the cell as shown in the station diaries is not a true reflection of the number of hours the respondent was actually interrogated. The persons who made the entries were not present during the interrogation and would not know how long the interrogation took place. Only the interrogators or persons involved with the interrogations would know. The learned trial judge accepted the evidence of TWT PW12. The learned trial judge heard and saw the said witness, including the other prosecution witnesses and the respondent and his witness testified before him. He had the first hand advantage of hearing and observing the witnesses giving evidence before him and to observe their demeanour, which an appellate court is at a disadvantage. The credibility of a witness is primarily a matter for the trial judge. The functions of an appellate court, when dealing with a question of fact in which questions of credibility are involved are limited in their character and scope and in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen an appellate court, must in order to reverse not merely entertain doubts whether the decision below is right, but be convinced that it is wrong: *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232.

[43] In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* the trial judge admitted the cautioned statement in question but the Federal Court reversed it on the ground that the trial judge wholly discounted the entries in the station diaries which showed 'prolonged periods of interrogation and extremely odd hours of interrogation ranging with the early hours in the morning in breach of r 20 of the Lock-up Rules'. The trial judge also seemed to reverse the burden of proof on the accused to rebut the evidence for the prosecution instead of dealing with the matter as one for the prosecution to establish beyond reasonable doubt that the statement was made voluntarily.

[44] In the case before us the learned trial judge had not disregarded the entries in the detention register and the station diaries. His Lordship examined them vis a vis the evidence of the prosecution witnesses, in particular the evidence of TWT PW12 (Sgt Major Khor) and accepted his evidence. There was no misdirection on the burden of proof that it was on the prosecution to show that the statement was made voluntarily.

[45] The following passages which form part of His Lordship's judgment in respect of the trial within a trial clearly demonstrate how the learned trial judge addressed his mind to some of the material allegations made by the respondent against the prosecution witnesses:

> The accused also called a witness during the TWT in the person of Sim Eng Huat. He came to confirm that he did not share a cell with the accused while he was detained at the Sg Maong Lock-up. Of course his evidence on the matter is directly opposite to that given by the prosecution witnesses on the same point, namely the lock-up sentries. Between Sim Eng Huat's evidence and that of the lock-up sentries, I prefer the evidence of the lock-up sentries to the effect that the accused had shared a cell with Sim Eng Huat. What they say is probable and consistent with the entries in the Detention Register and Lock-up Diaries, which I have earlier said I do not find to be fictitious or false entries. On the other hand, what Sim Eng Huat says on the matter is a bare assertion unsupported by any other reliable evidence.
>
> With regard to the accused's allegation that he was interrogated for long periods of at least 11 hours a day, I find this difficult to believe because the evidence shows, especially from the lock-up sentry assigned to escort him during that period, TWT PW3, that the accused was served and had a lunch break daily and was also allowed to go to the toilet on request. In view of this I am more inclined to believe TWT PW12 Sgt Maj Khor that the accused's interrogation lasted for 5 to 6 hours per day.
>
> With regard to the accused's allegation that he was blindfolded for 5 days and nights, I prefer the evidence of Sgt Maj Khor that there was no need to hide his identity from the accused because he and the accused were already familiar with each other from the accused's previous arrests for other offences. Further, the accused himself says he could recognise Sgt Maj Khor's voice. So given the fact that the accused never said that he was physically assaulted by any of his interrogators, there is no plausible reason why these people would want to hide their identities from him by blindfolding him. With regard to the accused's allegation that he was handcuffed for 5 days and nights, I find that this cannot be true as the entries in the Lock-up Diaries and Register show that he was kept in the lock-up. His hands would not have been cuffed then.
>
> In the result, having considered all the evidence adduced in this TWT I find that the prosecution has proved beyond a reasonable doubt that the accused had given his cautioned statement voluntarily without any inducement, threat or promise. I further find that it has not been shown to the court that it 'appears' that the accused's cautioned statement was made involuntarily.
>
> I accordingly hold that the accused's cautioned statement is admissible in evidence and admit it.

[46] The Court of Appeal nevertheless disagreed with the learned trial judge. It ventured into saying that, 'on the evidence, Sgt Maj Khor (TWT PW12) could not have been telling the truth'. The lock-up sentry (TWT PW13) did not explain how long was the lunch break and how long was the toilet breaks. But from the notes of proceedings, we find that TWT PW12, had in his

evidence clearly stated the times he started and stopped the interrogation and the time for lunch breaks. For instance at p 72 of Vol 2d of the appeal record, TWT PW12 said:

> we broke off for lunch at 12.45 pm when the accused had his lunch in the interrogation room. I continued to interrogate at 2 pm until 5.30 pm. The same procedure in the morning session was followed in the afternoon session. After the interrogation ended at 5.30 pm on 5.3.2005 the accused was sent back to the lock-up.
>
> The fourth interrogation session was on 6.3.2005 from 7.00 am until 12.50 pm. The accused had taken his breakfast. He confirmed to me he had.

[47] In re-examination, TWT PW12 explained:

> From 3.3.2005 till 8.3.2005 the accused was interrogated only one hour after I had spoken to him. Within that one hour we enquired from accused whether he had any allegations or complaints about being detained by the police. We also enquired from the accused about his hobbies.

[48] The lock-up sentry TWT PW13, contrary to what the Court of Appeal found, did in fact said that he would allow the respondent about one hour for his lunch:

> I would allow the accused one hour to have his lunch during which time the accused could also rest (Volume 2e page 24, Appeal Record).

[49] We could not detect any flaw in the 21 page judgment of the learned trial judge delivered at the end of the trial within a trial to justify us to come to the conclusion, as the Court of Appeal did, that TWT PW12 could not have been telling the truth. There is no cogent ground for us to interfere with the trial court's evaluation of TWT PW12's evidence and its finding that the cautioned statement was given voluntarily. The Court of Appeal said that it made allowance for lunch breaks and toilet breaks. Had it actually done so, the length of interrogation in each day would certainly be less than ten and a half hours. It was put by learned counsel for the respondent that the interrogation commenced immediately after the respondent entered the investigation room. TWT PW12 replied:

> No, I would ask him how he felt and whether he had taken his breakfast.

SECOND GROUND: CORROBORATION

[50] The contention by the defence was that there was no independent evidence to corroborate the respondent's admission in the cautioned statement that he was the rider of the motorcycle.

[51] The Court of Appeal held that the evidence of corroboration referred to by the learned trial judge, that is:

(a) the narration about the gold coloured Proton Wira car;

(b) the narration about the RM1m cheque; and

(c) the narration about the black brief case,

was not independent corroboration and had no bearing whatsoever on the fatal shooting incident, particularly on the question: was the appellant the driver of the motorcycle used by the gunman who shot the deceased? The Court of Appeal at p 21 of its judgment said:

> ... we are of the view that there is no corroborative evidence whatsoever of that part of the cautioned statement *directly pertaining to the identity of the driver of the motorcycle.* (Emphasis added.)

[52] The word 'corroboration' means 'confirmation' or 'support': *Deputy Public Prosecutor v Hester* [1972] 3 All ER 1056; [1973] AC 296. It has no special technical meaning. By itself it means no more than evidence tending to confirm other evidence: *DPP v Kilbourne* [1973] AC 729.

[53] Thus, corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. Corroboration must be in material particulars and it is not necessary that the whole prosecution story or all material particulars should be corroborated: *Attan bin Abdul Ghani v Public Prosecutor* [1970] 2 MLJ 143. The English Court of Appeal in *The King v Baskerville* [1916] 2 KB 658 at p 667, long regarded as the locus classicus on the law of corroboration said:

> ... evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicate him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.

[54] The Court of Appeal held the view that evidence of corroboration to support the respondent's admission that he was the rider of the motorcycle must be evidence *directly pertaining to the identity of the driver*. (Emphasis added.) It appeared that the Court of Appeal took the view that the evidence relating to the events that preceded the murder has no bearing on the shooting incident.

[55] In our judgment the shooting incident on 18 February 2005 should not be considered in isolation from with the events that preceded the murder. It

must be considered in the light of the surrounding circumstances leading to the murder. The case for the prosecution was that the murder was committed pursuant to a prearranged plan. The target was Fabian Lim. His office address was identified but no one had his photograph. Evidence was adduced that on 22 January 2005 the deceased's law firm was burgled. The prosecution called PW16 and PW20 who gave evidence that on 1 February 2005 the deceased's car was trailed by a Proton Wira car No BFJ 9275 driven by PW23 with PW26 as a passenger. PW23 and PW26 were arrested by the police on the same day, acting on information given by PW20. Hilman bin Sutt ('PW18'), who was a clerk at the deceased's law firm testified that a few days before the break in he saw a male Chinese with another person, sitting on a motorcycle parked next to the law firm. This Chinese male later walked up the staircase to the said law firm. He later identified him, at an identification parade, as Sim Eng Huat ('PW26'). The defence did not cross-examine PW18. On 22 January 2005 the deceased office was broken into. The deceased lodged a police report of the break in. Several items, including some bags, a one million ringgit cheque and photographs containing the deceased picture were stolen. This evidence came from PW16, the deceased's wife and PW20.

[56] Lily bte Jeni ('PW19'), a litigation clerk at the deceased's law firm testified that a few days before the break in a male Chinese, a total stranger, came and requested to see a lawyer. She brought him to see Mr Lim Heng Choo, the deceased's partner. He later left but one or two hours later, came back and told PW19 that he wanted to see Mr Fabian Lim and not Mr Lim Heng Choo. He left when PW19 told him that Mr Fabian Lim ('the deceased') was busy.

[57] It was a fact that the driver ('PW23') and the passenger ('PW26') of the Proton Wira car were later charged under s 118 of the Penal Code. Sim Eng Huat ('PW26') pleaded guilty to the charge and admitted the facts of the case as presented by the prosecution. The driver was given a discharge.

THE BLACK BAG (EXH P110)

[58] Now, consider the black bag. It is not disputed that the black bag ('exh P110'), identified by PW20, was recovered from the respondent's rented house in Kuching on 2 March 2005 ie on the same day that he was flown to Kuching and brought to his rented house after being arrested in Sibu.

[59] DSP Mohd Zaini bin Hj Che Din ('PW24') said that he seized the black bag from the respondent's house on 2 March 2005, along with some other items, when he and his officers went to the respondent's house. That was

the only black bag recovered from the house. It was earlier stolen during the break in at the deceased's law firm. PW24 denied that the black bag was planted by Yosie Yolanda Anton.

[60] It is significant to note that the respondent did not explain how the black bag, which belonged to PW20, ended up in the respondent's house, after the break in. Nobody was charged with retaining stolen property. Nor was anyone charged for the burglary at the office of Messrs Lim & Lim.

[61] The fact that the stolen black bag was found in the respondent's house after the break in may attract the presumption under s 114(a) of the Evidence Act 1950 that he may be associated with the commission of a crime.

[62] Section 114 reads:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume –
>
> (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

[63] Although the illustration in (a) of s 114 of the Evidence Act speaks of being in possession of stolen goods, it does not limit the scope of s 114. It is an illustration of the general proposition in s 114: see *Tan Teow Swee v Regina* [1955] 1 MLJ 76. *Sarkar on Evidence* (14th Ed), Vol 2 at p 1507 explained:

> S.114 deals with such presumptions and the illustrations to the section are instances of only a few of the numerous presumptions that are constantly drawn. Their number is countless. The illustrations are not statements of law qualified only by particular exceptions. They are merely instances of the application of certain maxims out of many possible instances (*Govinda v R*, 69 IC 257). The illustrations are not intended to lay down rules of law which are exhaustive. They are merely examples and other presumptions of a similar kind may be drawn (*Cheeda v R*, A 1944 A 281; *Chavadappa v R*, A 1945 B 292; *Chimma v S*, A 1961 Raj 35). The illustrations are nothing but illustrations and it is always open to a court to go back to the main section and consider whether it applies to any given set of facts (*Debi Pd v R*, A 1947 A 191 FB; *Rustom v R*, 24 IC 146: 15 Cr LJ 410).

[64] The illustrations are not exhaustive. Thus s 114 applies to all crimes. *Sarkar on Evidence* at p 1518 further explained:

> Presumption Applies Also to Other Offence, eg Murder, Robbery etc, – This presumption, which in all cases is one of fact rather than law, is occasionally so strong as to render unnecessary any direct proof of what is called corpus delicti (Tay s 141). The presumption is not confined to cases of theft, but applies to all crimes, even the most penal. Thus, on an indictment for arson, proof that property, which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, has been held to raise a probable presumption that he was present and concerned in the offence (*R v Rickman*, 2 East PC 1035). A like inference has been raised in the case of murder accompanied by robbery (Will Cri Ev 61), in the case of burglary (*R v Gould*, 9 C & P 364; *R v Exall*, 4 F & F 922), and in the case of the possession of a quantity of counterfeit money (*R v Fuller*, 1816 R & R 308; *R v Jarvis*, 25 LJ MC 30; Tay s 142).

[65] Similarly, the Federal Court in *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367; [2009] 3 CLJ 109 and *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579 expressed the same opinion on the scope of s 114 of the Evidence Act 1950. The Federal Court, in both cases, quoted with approval, the following passage in *Wills on Circumstantial Evidence* (7th Ed), p 104:

> The possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft. Upon an indictment for arson, proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, was held to raise a presumption that he was present at, and concerned in, the offence; *R v Rockman* [1789] 2 East PC p 1035, and see *R v Fuller* [1816] R & R 308. This particular fact of presumption commonly forms also a material element of evidence in cases of murder; which special application of it has often been emphatically recognised. It is upon the same principle that a sudden and otherwise inexplicable transition from a state of indigence and a consequent change of habits or a profuse or unwanted expenditure inconsistent with the position in life of the party, is sometimes a circumstance extremely unfavourable to the supposition of innocence (*R v Burdock*) (murder by poison) Bristol Assn Ap 1835, Cor: Sir Charles Wetherell, Recorder.

[66] The presumption in s 114 of the Evidence Act 1950 is not mandatory. It is only discretionary. It ought to be used only where its use is strictly for the ends of justice: *Mohamed Ali v Public Prosecutor* [1962] 1 MLJ 230, *Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor* [1995] 2 MLJ 276. Whether or not there is justification to invoke s 114 depends very much on the set of the facts of each case. On the facts before us, the black bag discovered in the respondent's house not long after the break in and less than three weeks after the murder is indeed an independent evidence tending to connect the respondent with the crime with which he was charged unless it could be satisfactorily explained or accounted for.

A PW26'S TESTIMONY

[67] PW26 admitted in evidence that he had trailed the deceased about a month before the deceased was murdered. He admitted that he was arrested together with PW23, while trailing the deceased in the Proton Wira car and pleaded guilty to a charge under s 118 of the Penal Code. He admitted that on 18 February 2005 he trailed the deceased's car to the restaurant and saw the pillion rider open fire at the car when it was reversing out of the parking lot. He saw the pillion rider flee on a motorcycle ridden by another person. He said he knew the pillion rider and the rider of the motorcycle.

[68] However PW26 later contradicted himself when he said that he did not know the respondent. 'Ah Chai' that he referred to was a different person and not the respondent. He only knew the respondent after he was detained in the lock-up and not before the deceased was shot. The learned trial judge, after an exhaustive evaluation of the evidence before him, made a firm finding of fact that Ah Chai mentioned by PW26 was in fact the respondent.

[69] PW26, in cross-examination said that he could not see the face of the pillion rider and the rider of the motorcycle as they were wearing crash helmets with the visors. But when he was asked how did he know that the pillion rider was Ah Bee and that the rider of the motorcycle was the respondent, PW26 said:

> Because I did ask them after the incident.

[70] The reply was not wholly unexpected as he had been trailing the deceased's car on the day of the shooting and caught a glimpse at the deceased in his car after the shooting, before leaving the scene. He must have known in advance what would be forthcoming. He was also the person who brought ASP Wong Chee Keong ('PW21') to the place where the burnt motorcycle, allegedly ridden by the respondent was found. He would not have known the whereabouts of the motorcycle if there was no communication between him and the pillion rider or the rider of the motorcycle.

[71] Despite his complicity with the incident surrounding the murder of the deceased, learned counsel for the respondent in his written submission at the High Court submitted, without reservation, that PW26 was a witness of truth and as he was not impeached, his evidence that he did not know the respondent must be accepted as true. PW26 claimed that he only came to know the respondent for the first time on 9 March 2005, at the court lock-up. It was not the defence case that PW26's evidence was not worthy of credit due to self-contradictions in his evidence. It was not the defence case that PW26 was

an accomplice whose evidence requires corroboration or that PW26 was an interested witness who testified in court in order to save himself.

[72] Learned counsel's submission that PW26 did not know the respondent before the murder was however rejected by the learned trial judge. He gave his reasons why he did so.

[73] The learned trial judge held that he was entitled to accept and give weight to some parts of the evidence of PW26 and reject other parts which he found unworthy of belief: see *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, *Public Prosecutor v Dato Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 79, *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105b. The learned judge in his judgment said:

> It would be different of course where a witness consistently tells lies throughout his testimony such that the whole of his evidence must be given no credence or weight, but this is not such a case. Here, these two (2) witnesses have been selective in what they want to say. Not everything they said was untruthful. Accordingly, once the untruthful part of their evidence is rejected ie about not knowing the Accused, what remains is not inconsistent or in conflict with the rest of the prosecution case, nor has a reasonable doubt been cast on the prosecution case as alleged.

[74] It is obvious from his judgment that the learned trial judge did not consider PW26's evidence as wholly unworthy of credit. He had seen and heard PW26 giving evidence and after having evaluated his evidence the learned trial judge was prepared to accept, that except for the said contradiction, PW26's evidence was credible and capable of being believed. There was however one part of the evidence of PW26, that is, on the identity of the rider of the motorcycle which the learned judge overlooked. Here if at all the learned judge erred, he erred in not considering that evidence to the credit of the respondent.

[75] Despite the parties non submission before the High Court and before us as to whether PW26 was an accomplice, we hold the view that PW26 was an accomplice. It is trite that an accused person may be convicted solely on the evidence of an accomplice provided that he is found to be a credible witness and that the court had warned itself on the danger of convicting the accused on an uncorroborated evidence of an accomplice: see s 133 of the Evidence Act, *Lee Choh Pet & Ors v Public Prosecutor (No 2)* [1972] 1 MLJ 187, *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401.

[76] However, we find that there are ample independent evidence to corroborate PW26's evidence in material particulars. PW16's evidence that the deceased's car had been trailed by a golden coloured Proton Wira corroborated PW26's evidence that he had been trailing the deceased's car before the deceased was shot. PW20 could even see the Proton Wira car from his office

and took down the car's registration number before passing the information to the police who arrested PW26. PW18 who identified PW26 as the person who walked up the staircase leading to the deceased's office supported PW26's evidence that he had been observing the deceased going into and leaving his office. ASP Wong Chee Keong ('PW21') gave evidence that PW26 brought him to the place where the badly burnt motorcycle which was allegedly ridden by the respondent on the day of the shooting was found. There is no ground for us to interfere with the assessment of PW26's evidence by the learned trial judge.

[77] It is true that there was no direct evidence that the said motorcycle was the same motorcycle ridden by the respondent to carry the pillion rider on the fateful day. But PW10's and PW13's evidence that they saw the pillion rider open fire at the deceased's car and fled on a motorcycle ridden by another person, was consistent with the respondent's own story in his cautioned statement.

[78] In *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257, it was held that the court should not lightly differ from the views of the trial court since he had the advantage of seeing and hearing the witnesses whose demeanour he was able to study in order to form his opinion as to their credibility. Ong Hock Thye FJ, in delivering the judgment of the Federal Court quoted what Lord Greene MR in *Yuill v Yuill* [1945] P 15, at p 19 said:

> We were reminded of certain well known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction.

[79] It has been said that being shaken or unshaken in cross-examination is not per se an all sufficient acid test of credibility. The inherent probality or improbality of a fact in issue must be the prime consideration: see *Muniandy & Ors v Public Prosecutor*; *Public Prosecutor v Dato Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 79. The learned trial judge had carefully evaluated PW26's evidence and concluded that PW26 was a truthful witness.

[80] Therefore there was independent corroborative evidence before the trial court to support the prosecution case that the respondent was, as admitted by him in his cautioned statement, the rider of the motorcycle which carried the pillion rider who shot the deceased on 18 February 2005.

[81] For the reasons as stated above we allow the appeal, set aside the order of the Court of Appeal and reinstate the conviction and sentence passed by the High Court.

Appeal allowed.

Reported by Afiq Mohamad